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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 444

THE SEVEN-UP COMPANY,

Petitioner,

vs.

THE GET UP CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BEVERLY W. PATTISHALL,
3500 Prudential Plaza,
Chicago, Illinois 60601,
Counsel for Petitioner.

WOODSON, PATTISHALL & GARNER,
W. THOMAS HOFSTETTER,
ROBERT M. NEWBURY,
Chicago, Illinois,
JOHN T. TABOR,
St. Louis, Missouri,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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THE GET UP CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, The Seven-Up Company, plaintiff in the District Court, appellant below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on January 8, 1965.

I.

CITATIONS TO OPINIONS BELOW.

The opinion of the District Court appears at pages 531a-557a of the Joint Appendix, and is reported at 137 U. S. P. Q. 871. The opinion of the Court of Appeals appears as Appendix B hereto, and is reported at 340 F. 2d 954.

II.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 8, 1965 (App. B., *infra*, p. 14). Rehearing was denied on May 13, 1965 (App. C., *infra*, p. 16). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) and 15 U. S. C. § 1122.

III.

QUESTIONS PRESENTED.

1. Whether the Court of Appeals has sanctioned so radical a departure by the trial court from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision, as provided by Rule 19(1)(b), by affirming, without comment, the trial court's arbitrary, erroneous and repeated refusal to receive petitioner's evidence essential to its proofs.

2. Whether the Court of Appeals has sanctioned so radical a departure by the trial court from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision, as provided by Rule 19(1)(b), by affirming, without comment, the trial court's arbitrary, erroneous and repeated refusal to inform petitioner of the reasons or grounds for sustaining objections to petitioner's evidence essential to its proofs.

IV.

STATUTES INVOLVED.

The only statute or rule directly involved in this petition is Supreme Court Rule 19(1)(b). Collaterally involved is Title 15 U. S. C. 1114(1).

V.

STATEMENT.

This is an action for trademark infringement and unfair competition. The jurisdiction of the District Court was invoked because this is an action *de novo* arising from a prior Patent Office proceeding (15 U. S. C. 1071; 35 U. S. C. 146), because this is an action arising under the trademark laws of the United States (15 U. S. C. 1121; 28 U. S. C. 1338), and because of the diversity of citizenship of the parties, the requisite jurisdictional amount being involved.

Petitioner's complaint, after alleging long prior use of the trademark 7 UP for soft drinks, alleges that purchaser confusion and deception results from respondent's use of the trademark GET UP for soft drinks (6a-8a). At the conclusion of the trial, the complaint was dismissed, and that judgment was affirmed by the Court of Appeals in its two paragraph *per curiam* decision.

At the trial, petitioner sought to introduce the testimony of more than one hundred witnesses who had actually purchased GET UP believing it to be put out by the makers of 7 UP (57a-232a). The District Court, however, summarily refused to hear any of such testimony, refused to allow petitioner's counsel to be heard on the subject and failed to state any reason or basis for the rejection (58a). Likewise, when petitioner sought to introduce into evidence copies of respondent's bottling franchise agreement which contain

respondent's own evaluation of the likelihood of confusion resulting from the use by others of the term UP in soft drink trademarks, the trial court refused to admit the exhibits (237a).

Throughout the trial, petitioner's counsel repeatedly inquired of the trial court as to the basis for evidentiary exclusions (425a, 437a, 468a), and petitioner even asked for a recess to inquire into the reasons why evidence was being excluded (58a). Without exception, petitioner's requests were summarily denied.

The foregoing conduct, all urged on appeal by petitioner as grounds for reversal, was sanctioned by the Court of Appeals without comment. Subsequently petitioner sought rehearing solely on the aforementioned evidentiary errors, but the petition was denied without comment (Appendix C).

VI.

REASONS FOR GRANTING THE WRIT.

A. The Decision Below Sanctioned the Denial of a Fair Trial by Affirming, Without Comment, the Trial Court's Arbitrary, Erroneous and Repeated Refusal to Receive Petitioner's Evidence Essential to Its Proofs.

The conduct of the trial judge below, in arbitrarily refusing to hear petitioner's evidence essential to its proofs, "so far departed from the accepted and usual course of judicial proceedings" as to demand that this Court exercise its power of supervision. Rule 19(1)(b). This demand is the more compelling because the Court of Appeals totally failed to comment upon the trial court's wholesale exclusion of evidence. *Griffin* v. *U. S.*, 336 U. S. 704, 707 (1949). Ordinarily, evidentiary errors would not warrant the granting of a writ, but the unrestrained, persistent exclu-

sion of essential admissible evidence in the present case was so "obviously and injuriously erroneous" that, because of the sanction of the Court of Appeals, it peculiarly requires rectification by this Court. *Gibson* v. *Lockheed Aircraft Serv., Inc.*, 350 U. S. 356, 357 (1956).

Petitioner submits that a writ of certiorari should be granted here, not only to correct the gross error committed below, but also, in the exercise of this Court's supervisory power, to formulate and apply proper standards for the federal courts in the conduct of trials. *McNabb* v. *U. S.*, 318 U. S. 332, 341 (1943); *Marshall* v. *U. S.*, 360 U. S. 310, 312 (1959). The *per curiam* decision below has sanctioned grievous evidentiary errors that violated fundamental principles of justice and that completely denied petitioner a fair trial. In the *McNabb* case, this Court stated, at page 341:

> "In the exercise of its supervisory authority over the administration of criminal justice in the federal courts (citing case), this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions. (Citing cases.) And in formulating such rules of evidence for federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance."

The *McNabb* rule is not limited to criminal justice and has been applied in the exercise of this Court's supervisory authority over the administration of civil justice in the federal courts. *Thiel* v. *Southern Pac. Co.*, 328 U. S. 217, 225 (1946).

To understand the extraordinary nature and extent of the trial court's evidentiary errors requires only a cursory knowledge of the case. This action being for trademark infringement and unfair competition, the issue is whether use of the accused mark is likely to cause confusion as to

source (15 U. S. C. 1114(1)). To prove that such confusion is likely, petitioner offered the testimony of over one hundred witnesses who had actually purchased respondent's GET UP soft drink under the mistaken belief that they were buying a product put out by the makers of 7 UP. The trial court, however, arbitrarily refused to permit any consumer witness to testify as to his or her own actual confusion in the market place[1] and refused to permit petitioner's counsel to be heard respecting the universally accepted admissibility of such evidence. Set forth below is the trial judge's ruling on the first consumer witness called by petitioner, which ruling was repeated by the trial judge more than one hundred times (58a).

> "Q. When you purchased GET UP did you have any belief as to what company put it out?
>
> Mr. Howes: I object, your Honor.
>
> The Court: Sustained.
>
> A. I believe it was put up—
>
> The Court: That will be stricken.
>
> Mr. Pattishall: May I be heard on that, your Honor?
>
> The Court: No, sir.
>
> Mr. Pattishall: Your Honor, this is—
>
> The Court: I said no, sir. Put another question if you have one."

After thus being precluded from introducing its evidence, petitioner made the following offer of proof (58a):

> "That if the witness had been permitted to answer

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1. 58a, 59a, 60a, 61a, 62a, 63a, 64a, 67a, 68a, 70a, 73a, 74a, 76a, 77a, 78a, 79a, 80a, 81a, 82a, 84a, 85a, 87a, 88a, 89a, 90a, 93a, 96a, 97a, 99a, 100a, 102a, 104a, 106a, 107a, 108a, 109a, 111a, 112a, 113a, 114a, 115a, 117a, 118a, 119a, 120a, 121a, 122a, 124a, 125a, 126a, 128a, 129a, 131a, 132a, 133a, 135a, 136a, 137a, 139a, 141a, 142a, 143a, 144a, 146a, 147a, 148a, 149a, 150a, 151a, 152a, 153a, 154a, 155a, 156a, 157a, 158a, 159a, 160a, 161a, 163a, 164a, 165a, 167a, 168a, 169a, 170a, 171a, 172a, 173a, 174a, 176a, 177a, 178a, 179a, 180a, 182a, 183a, 184a, 185a, 186a, 187a, 188a, 189a, 190a, 230a-232a.

> the question put she would have testified that when she purchased GET UP she was under the belief that it was put out by the Plaintiff, The Seven-Up Company, because of the brand 'GET UP' and she remained under that belief until recently when it was explained to her that the product did not come from Seven-Up."

Similar evidence of confusion is held by every federal circuit to be proof of the statutory (15 U. S. C. 1114(1)) and common law evidentiary issue in trademark cases. *Standard Oil Co.* v. *Standard Oil Co.*, 252 F. 2d 65, 74 (10th Cir. 1958); *National Van Lines* v. *Dean*, 237 F. 2d 688, 692 (9th Cir. 1956); *F. W. Fitch Co.* v. *Camille, Inc.*, 106 F. 2d 635, 640 (8th Cir. 1939); *Square D Co.* v. *Sorenson*, 224 F. 2d 61, 64 (7th Cir. 1955); *Hemmeter Cigar Co.* v. *Congress Cigar Co.*, 118 F. 2d 64, 70 (6th Cir. 1941); *Pure Foods, Inc.* v. *Minute Maid Corp.*, 214 F. 2d 792, 797 (5th Cir. 1954); *Little Tavern Shops, Inc.* v. *Davis*, 116 F. 2d 903, 905, 906 (4th Cir. 1941); *Perfectform Corp.* v. *Perfect Brassiere Co.*, 256 F. 2d 736, 740 (3rd Cir. 1958); *Harold F. Ritchie, Inc.* v. *Chesebrough-Pond's, Inc.*, 281 F. 2d 755, 761 (2d Cir. 1960); *Simmons Co.* v. *Baker*, 200 F. Supp. 149, 152 (D. Mass. 1961), *aff'd* 307 F. 2d 458 (1st Cir. 1962); *Coca-Cola Co.* v. *Chero-Cola Co.*, 273 Fed. 755, 756 (D.C. Cir. 1921).

Likewise, the District Court arbitrarily refused to admit respondent's own evaluation of likelihood of confusion which was contained in respondent's franchise agreements (Plf's Exh. 8 for id; 558a). These agreements provide:

> "The Bottler will not bottle, distribute or sell, directly or indirectly, any other beverage with the name 'UP' and/or any beverage which could be confused with Get Up."

In spite of the inarguable materiality of such a statement by respondent, the trial court not only excluded the

exhibits, but also summarily interrupted and stopped petitioner's efforts to explain their materiality (237a).

That it is not within the trial court's discretion to reject admissible evidence is beyond dispute. Yet the Court of Appeals, without comment, sanctioned the trial court's totally erroneous evidentiary exclusions. Petitioner has thus been precluded from proving its crucial allegations of actual confusion and has repeatedly been denied any explanation for so radical a departure "from the accepted and usual course of judicial proceedings." Rule 19(1)(b). That petitioner should not be denied a fair trial or a fair and full day in court, and that such denial should not be sanctioned by the Court of Appeals are, *a fortiori*, matters "'of general importance,'"[2] deserving review by this Court.

B. The Decision Below Sanctioned the Denial of a Fair Trial by Affirming, Without Comment, the Trial Court's Arbitrary, Erroneous and Repeated Refusal to Inform Petitioner of the Reasons or Grounds for Sustaining Objections to Petitioner's Evidence Essential to Its Proofs.

In a trial that involved less than three hundred questions by petitioner's counsel (excluding merely preliminary matter), the District Court sustained, without stating any ground whatever, objections to approximately one hundred questions. As previously shown, all of petitioner's evidence of actual confusion was rejected without any basis being stated, and petitioner's requests to be heard were summarily refused (30a, 58a, 192a, 247a, 249a-250a, 334a, 387a, 400a, 485a-486a). Whenever petitioner asked for the grounds for

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2. "Manning The Dikes" Mr. Justice Harlan, 18th Annual Benjamin Cardozo Lecture, October 28, 1958. Record, Assoc. of the Bar of the City of New York. Vol. 13:541 at p. 551.

evidentiary exclusions, the trial judge refused to inform petitioner, often saying that there was "no need" for petitioner to know why its evidence was being excluded. The following record excerpts show the arbitrary conduct of the trial judge in rejecting petitioner's repeated attempts to learn why its evidence was being excluded:

> "Mr. Cohen: Objection.
> The Court: Sustained.
> Mr. Pattishall: May I inquire what the grounds are, your Honor?
> The Court: No need." (425a.)

> "Mr. Howes: I object.
> A. Yes.
> The Court: Sustained.
> Mr. Pattishall: That seems like a proper question to me, your Honor. May I inquire what's wrong with that?
> The Court: A lot of things. There is no need to explain. You understand your lawsuit better than I do." (437a.)

> "Mr. Collison: Objection.
> The Court: Sustained.
> Mr. Pattishall: May I inquire what the grounds for the objection to that last question were?
> The Court: Because it was improper.
> Mr. Pattishall: Sir?
> The Court: Because it was improper.
> Mr. Pattishall: May I ask in what respect?
> The Court: You should know. A man of your experience isn't that ignorant of the Rules of Evidence." (468a.)

When grounds for sustaining objections are stated, the objections may be cured. When the trial judge refuses to state grounds, the process of trial is correspondingly refused. Although this Court has not yet dealt directly with this problem, it has been held by state Supreme Courts that,

when a party inquires of a trial court the ground for sustaining an objection, "it is the court's duty to answer that inquiry" *Adelmann* v. *Elk River Lumber Co.*, 242 Minn. 388, 394, 65 N. W. 2d 661, 666 (1954); *Colburn* v. *Chicago, St. P., M. & O. Ry. Co.*, 109 Wis. 377, 85 N. W. 354 (1901). This Court should articulate a similar rule requiring the federal trial judges to state the grounds for evidentiary rulings when the litigants are in doubt and inquire as to the basis of a ruling. Such a rule would provide a record to review evidentiary rulings on appeal. The need for such a record is shown by the fact that here, after the trial judge's refusal to inform petitioner of the reason for exclusion of its evidence and the Court of Appeal's lack of comment, petitioner is still totally uninformed as to why its evidence was rejected. Since petitioner even yet does not know why its evidence was excluded, petitioner is unable to argue fully as to the impropriety of the exclusion rulings. In *Griffin* v. *U. S.*, 336 U. S. 704 (1949), at page 707, this Court commented on the failure of a Court of Appeals to state the basis of its ruling:

> "Unfortunately, the Court of Appeals evidently thought that the ground for dismissing the appeal was too clear to require explication. It dismissed the appeal without an expression of views regarding the admissibility of the evidence on which the claim for a new trial rests. * * * It seems to us more appropriate for the Court of Appeals to address itself directly to the issue of admissibility."

Petitioner submits that so gross has been the failure of the judicial process that a matter "of general importance" deserving review by this Court is presented. Petitioner has raised in its appeal and reiterated in its Petition for Rehearing that it was denied a fair trial. Petitioner requested remand for another trial before another judge, but was denied its requests without comment or explana-

tion by the Court of Appeals in the face of a record disclosing repeated refusal by the trial judge to receive inarguably admissible evidence on basic contested issues, and moreover, repeated refusal even to state its grounds for excluding such evidence.

VII.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BEVERLY W. PATTISHALL,
3500 Prudential Plaza,
Chicago, Illinois 60601,
Counsel for Petitioner.

WOODSON, PATTISHALL & GARNER,
W. THOMAS HOFSTETTER,
ROBERT M. NEWBURY,
Chicago, Illinois,
JOHN T. TABOR,
St. Louis, Missouri,
Of Counsel.

APPENDIX A.

Supreme Court Rule 19(1)(b).

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

* * * * *

(b) Where a court of appeals * * * has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

Title 15 U. S. C. § 1114(1)

Any person who shall, without the consent of the registrant—

(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive shall be liable in a civil action by the registrant for the remedies hereinafter provided.

APPENDIX B.

No. 15630

UNITED STATES COURT OF APPEALS.

For the Sixth Circuit.

THE SEVEN-UP COMPANY, *Plaintiff-Appellant,* *vs.* THE GET UP CORPORATION, *Defendant-Appellee.*	Appeal from the United States District Court for the Northern District of Ohio, Eastern Division.

Decided January 8, 1965.

Before EDWARDS, *Circuit Judge,* PRETTYMAN, *Senior Circuit Judge,** and BOYD, *District Judge.***

PER CURIAM. The Seven-Up Company, our appellant, sued The Get Up Corporation for infringement of its trademark and for unfair competition. The action was tried by the District Court without a jury. That court heard extensive evidence, made findings of fact, reached conclusions of law, rendered an opinion, and dismissed the complaint. The opinion was emphatic and in parts phrased colloquially, but it was clear in its holdings. We find in it no error affecting substantial rights of the appellant-plaintiff.

* Sitting by designation from the District of Columbia Circuit.

** Sitting by designation from the Western District of Tennessee.

Appellant urges that the trial court applied to the problem a test of likelihood of confusion of goods whereas the proper test is of likelihood of confusion as to source. Quite apart from the vague niceties of the distinction, it is quite clear that the court, in ruling upon the case, considered and passed upon the contention as made by the plaintiff. Thus, in stating the issues the court said: "Plaintiff further says that Defendant by such confusion of source of purchase is misappropriating Plaintiff's business. . . ." The court quoted from and relied upon the opinion of the Tenth Circuit in *The Standard Oil Company* v. *Standard Oil Company,* 252 F. 2d 65 (1958). The trial court phrased the test of that case as follows: "So a proper test relates to producing in the minds of ordinary purchasers, exercising due care in the market place, confusion as to origin of goods." It seems clear to us that the District Court did not, as our appellant urges, apply ar erroneous test.

AFFIRMED.

APPENDIX C.

UNITED STATES COURT OF APPEALS.
For the Sixth Circuit.

THE SEVEN-UP COMPANY,
Plaintiff-Appellant,
vs.
THE GET UP CORPORATION,
Defendant-Appellee.

No. 15,630

ORDER.

(Filed May 13, 1965, Carl W. Reuss, Clerk.)

Before EDWARDS, *Circuit Judge,* PRETTYMAN, *Senior Circuit Judge,* and BOYD, *District Judge.*

Appellant's petition for rehearing having been received and considered, said petition is hereby denied.

Entered by order of the Court.

CARL W. REUSS,
Clerk.